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No. 80-517

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JUNEAU SQUARE CORP., et al.,

Petitioners,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARSHALL-MICHIGAN AND FIRST WISCONSIN RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in ruling that the district judge had not abused his discretion in granting defendants' motion for a new trial, where the district judge concluded that:

a) his management of the first trial had been prejudicial to defendants;

b) he had erroneously admitted unreliable and unfairly prejudicial hearsay;

c) he had erroneously admitted evidence which may have resulted in duplication of damages;

d) plaintiffs' contentions, particularly on critical issues in the lawsuit, were against the overwhelming weight of the evidence; and,

e) the first trial had resulted in a miscarriage of justice.

2. Whether the court of appeals erred in declining to reverse the district judge's denial of plaintiffs' new trial motion after the jury had returned a verdict on all issues for defendants in the second trial, where both the district judge and the court of appeals concluded that plaintiffs' objections to sundry jury instructions, evidentiary rulings, and matters of trial management, were in each instance without merit.

3. Whether the court of appeals erred in sustaining the district judge's directed verdict for defendants at the first trial on plaintiffs' monopolization claims under Section 2 of the Sherman Act, where plaintiffs failed to present any proof that defendants possessed substantial market power, even accepting plaintiffs' unsubstantiated and overly narrow definitions of the relevant geographic and product markets.

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STATEMENT OF THE CASE

Respondents First Wisconsin Corporation, First Wisconsin National Bank of Milwaukee, First Wisconsin Development Corporation, and Marshall-Wisconsin Co., Inc. (collectively referred to herein as the "First Wisconsin defendants"), and respondent Marshall-Michigan Co., Inc., submit this brief in opposition to plaintiffs' Petition for a Writ of Certiorari.[1]

[1] Petitioners' petition and appendix will be cited in this brief as "Pet. _____," and "Pet.App. _____," respectively. References to the appendix filed herewith by these respondents are denoted "Res.App. _____." Plaintiffs' trial exhibits are cited as "PX _____," and defendants' as "WX _____."

I.

HISTORY OF THE LITIGATION

The plaintiffs commenced this civil antitrust action for treble damages in 1972. The first trial, which lasted five months, began on May 3, 1976, before Judge Robert W. Warren, who has presided over this case since 1973. On October 1, 1976, the jury returned the verdict in favor of the plaintiffs against Marshall-Michigan and the First Wisconsin defendants, but found that Aetna, another defendant, had not been a member of any conspiracy. Judgment was entered accordingly on October 26, 1976.

The First Wisconsin defendants and Marshall-Michigan filed a timely motion for judgment notwithstanding the verdict, or in the alternative for a new trial or a remittitur. Plaintiffs moved, *inter alia,* for a new trial as to Aetna if any relief were to be given to the First Wisconsin defendants or Marshall-Michigan on their motion. The trial court by memorandum order dated July 29, 1977, denied defendants' motion for judgment notwithstanding the verdict, but granted their motion for a new trial, and refused to upset the jury's verdict in favor of Aetna. (435 F.Supp. 1307, Pet.App. 51.)

Judge Warren ordered a new trial on a number of grounds, including that:

(1) The unequal trial time limitations placed upon plaintiffs and defendants put defendants at a substantial and unfair disadvantage—thirteen weeks for plaintiffs as opposed to little more than three for defendants (435 F.Supp. at 1324, Pet.App. 88-89);

(2) the admission into evidence of unreliable hearsay evidence which was highly prejudicial to defendants and should have been excluded (435 F.Supp. at 1322-1324, Pet.App. 85-88);

(3) plaintiffs' proof on the issue of damages resulted in confusion, was admitted erroneously in part, and resulted in possible duplication of damages (435 F.Supp. at 1325-1326, Pet.App. 90-91);

(4) since the jury had found that Aetna was not a member of any conspiracy, "the only loan transactions which are in any way linked to the First Wisconsin defendants are those involving Metropolitan and New York Life," and as to those transactions, plaintiffs' claims were against the "overwhelming" weight of the evidence (435 F.Supp. at 1322-1323, 1326, Pet.App. 82, 84); and,

(5) the prejudicial effect of the factors set out above was aggravated by the length of the trial and the complexity of the issues (435 F.Supp. at 1321, 1324-1326, Pet.App. 81, 89-90).

The trial court concluded:

> In the final analysis, the Court is persuaded that all of these factors affected the deliberation of the jury and resulted in a miscarriage of justice. The Court is not unmindful of the time and effort expended by the plaintiffs or the costs of a second trial, but these considerations must give way if justice is to be served. The defendants are also entitled to have their day in court. (435 F.Supp. at 1326, Pet.App. 92.)

The district judge also denied plaintiffs' motion for a new trial against Aetna (435 F.Supp. at 1326-1327, Pet.App. 93-94).

The second trial commenced on March 20, 1978, and lasted for three months. On June 19, 1978, the jury returned a verdict for defendants on all issues, and judgment was entered in favor of defendants on November 3, 1978. (Pet.App. 248-252.) Plaintiffs challenged the jury's verdict and sought to have the district judge order a third trial, but on July 31, 1979, the judge denied plaintiffs' motion for a new trial.

Plaintiffs thereafter filed their notice of appeal with the court of appeals seeking review of virtually every ruling adverse to them since the inception of the litigation seven years earlier.

After extensive briefing and oral argument in which plaintiffs exhaustively detailed their contentions with respect to the facts adduced at the two long trials and the manner in which these trials were conducted, the court of appeals on July 3, 1980, denying the appeal on all issues, affirmed the judgments for defendants.

Plaintiffs have now petitioned this Court for a writ of certiorari, asking this Court to reconsider the innumerable factual, evidentiary, trial management, and legal issues that have arisen in the eight-year life of this litigation.

II.

COUNTERSTATEMENT OF FACTS

Plaintiffs' Statement of the Case is misleading in that it treats as fact contentions that are contrary to the overwhelming weight of the evidence, and that are based on implausible inferences and pure speculation. Plaintiffs have for the most part simply ignored defendants' evidence. They have treated the facts as if this were an appeal from a grant of summary judgment or judgment notwithstanding the verdict. While we believe that the record amply supported defendants' motions for summary judgment and judgment notwithstanding the verdict, the trial court denied those motions almost entirely, and this is (with minor exceptions) an appeal (1) from a new trial order and (2) from a jury verdict for defendants.

The first portion of plaintiffs' Statement (Pet. 4-5) is particularly misleading in that it implies (without a single citation to the record) that the central feature of the evidence presented to the juries was a conspiracy between First Wisconsin and Northwestern Mutual Life Insurance Company (NML) to exclude plaintiffs from the Milwaukee rental office space market. No such conspiracy existed or was ever proven. The only evidence was that NML was willing to help anyone, including plaintiffs, who would improve the property near its

main office building which borders on both the First Wisconsin Center and plaintiffs' buildings. Indeed, plaintiffs offered relatively little evidence on this subject at either trial, probably because there was no evidence that any action of NML in any way disadvantaged plaintiffs.

The focus of both trials was First Wisconsin's alleged interference with plaintiffs' efforts to obtain mortgage financing for Juneau Square East, a new office building which plaintiffs proposed to build in downtown Milwaukee. The facts, *as viewed most favorably to the plaintiffs,* were summarized by the district judge (435 F.Supp. at 1309-1316, Pet.App. 54-56), and by the court of appeals (624 F.2d at 801-806, Pet.App. 1-4).[2] The facts material to this appeal are as follows:

Throughout their Statement of the Case plaintiffs seek to convey the impression that Juneau Square was a thriving real estate development in which any normal lender would have been pleased to invest. In fact, Juneau Square Corp. was drastically undercapitalized and had no resources to bear even the foreseeable losses during the construction and initial leasing phase of its building program, let alone the much greater losses that were ultimately incurred. Juneau Square Corp. was in grave financial trouble long before 1968 when First Wisconsin first became interested in the Juneau Square block, and the company managed to keep its exceedingly ambitious plans alive as long as it did only by, in plaintiff Jack Moertl's own words, "robbing Peter to pay Paul."

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[2] As the trial court noted (435 F.Supp. at 1309, Pet.App. 54): "In some respects, this presentation of the evidence emphasizes plaintiffs' theory of the case. For example, inferences which were urged by the plaintiffs will be referred to from time to time. This approach was adopted because of the nature of the motions before the Court [for judgment notwithstanding the verdict] and the fact that the jury found in favor of the plaintiffs [in the first trial.]"

First Wisconsin did not decide on the present location of its headquarters building or the amount of rental office space which would be available in that building until late 1968. By that time plaintiffs had already been forced to sell off a 50 percent interest in their property to defendant Marshall-Michigan, and undivided interests totalling an additional 25 percent to certain individuals. The severity of plaintiff Juneau Square Corp.'s financial plight as early as 1966 is indicated by the fact that it sold the 25 percent undivided interest without requiring the purchasers to pay their proportionate share of the Aetna mortgage. Juneau Square Corp. was thus in the untenable position of owning only 25 percent of the property, while remaining obligated to pay 50 percent of the Aetna mortgage and 100 percent of the remaining debts from construction of Juneau Square North and South.

The consequences were predictable. Cash flow was insufficient to pay expenses and financing charges. Plaintiffs obtained from Aetna a moratorium on principal payments but even this was insufficient, and plaintiffs defaulted on payment of their 1968 real estate taxes in the amount of nearly a quarter of a million dollars. This delinquency constituted a default under both the Marshall-Michigan and Aetna mortgages.

Plaintiffs hoped to cure their financial problems by the construction of a third building, Juneau Square East. They approached between 20 and 30 firms in an effort to obtain financing for that third building. Each application had a reduced probability of success, because Juneau Square Corp.'s debts were mounting steadily. (WX 417-419, Res.App. 1-4) Thus, plaintiffs never obtained the financing they sought for their proposed third building.

Despite their obvious undercapitalization and desperate financial condition, plaintiffs have chosen to blame their failure to secure financing for Juneau Square East on an alleged massive conspiracy participated in not only by the defendants, but by numerous lawyers from three law firms, officers of two

national insurance companies, and a prominent Milwaukee appraisal company. In addition, although plaintiffs did not name prospective lenders Metropolitan Life Insurance Company or New York Life Insurance Company as co-conspirators, they assert that employees of these companies (as well as of the defendants) lied to them, falsified their contemporaneous records, and testified untruthfully on the witness stand. These charges were rejected by the jury in the second trial, which after having listened to the evidence for three months, rendered its verdict for defendants on all issues.

In late 1968, First Wisconsin (which had been looking for a location for a new headquarters building for some time) settled on the block just west of Juneau Square and due south of NML's headquarters building. First Wisconsin proceeded to acquire that block on a confidential basis because it knew that if word got out that it was seeking to assemble several parcels of real estate in that area, the price would escalate.

It is neither unusual nor illegal, in connection with a major real estate project such as the First Wisconsin Center, to desire to acquire some adjacent property for furture expansion. The uniform testimony of First Wisconsin personnel was that that was the only reason for their interest in the Juneau Square block. That motive, however, did not meet plaintiffs' requirements because it had no antitrust implications and would not have supported a triple damage antitrust action. Consequently, plaintiffs developed their theory that First Wisconsin's motive was anticompetitive.

There was no evidence to support that theory, except plaintiffs' assumption that First Wisconsin would not want Juneau Square East built because no one wants more competition. This contention is contradicted by the testimony of the bank's officers that they did not expect significant competition from proposed Juneau Square East, because Juneau Square Corp. had informed them that East would be leased largely to

existing tenants in Juneau Square North and South that required additional space. First Wisconsin also believed that its building would be competing for a different class of tenants.

Moreover, the assumption that no one wants more competition, whatever merit it may have in ordinary circumstances, is incorrect when applied to a real estate project, such as the First Wisconsin Center, located in an undeveloped area. The far eastern part of the downtown Milwaukee area was, at all pertinent times, a relatively undeveloped sector of the City. The evidence shows that the firms having property in that vicinity favored further development even if the development was "competitive." Plaintiffs were themselves enthusiastic about the location of First Wisconsin Center, despite the fact that it represented additional and adjacent office space. Therefore, it cannot be inferred that it was contrary to First Wisconsin's interest to have another office building in the immediate area, and it also cannot be inferred that the benefits of further development in the area would not outweigh any possible temporary delay in the initial leasing of First Wisconsin Center.

Plaintiffs first sought financing for Juneau Square East from Aetna. On March 11, 1969, *before* First Wisconsin's representative contacted Aetna with respect to Juneau Square, Aetna definitively rejected plaintiffs' request for such financing. The foremost issue at the first trial—which issue that jury decided against plaintiffs and in favor of Aetna—was whether Aetna's refusal to finance Juneau Square East was the result of a conspiracy between First Wisconsin and Aetna. The jury said that it was not.

Plaintiffs failed to pay their 1968 real estate taxes, which was an act of default under both the Aetna and Marshall-Michigan mortgages. This default caused Aetna (in November of 1969) and later Marshall-Michigan (in January of 1970) to file foreclosure actions. The history of these actions, and the various settlement agreements made in connection with

them—along with Marshall-Michigan's attempt to forestall Aetna's suit by tendering to Aetna the amount of plaintiffs' tax delinquency, Marshall-Michigan's unsuccessful efforts in 1969 to sell its interests in Juneau Square to First Wisconsin "as is," and the steps taken by Marshall-Michigan to halt plaintiffs' apparent diversion of revenues from Juneau Square North and South for use in development of East—are summarized in the district court and court of appeals' opinions (Pet.App. 62-65 and 7-9, respectively), and need not be repeated here.

Suffice it to say that after two years of litigation and stipulations delaying foreclosure, plaintiffs twice failed to meet the deadlines prescribed in the settlement agreements for obtaining financing and, finally, on January 3 and January 4, respectively, Marshall-Michigan and Aetna entered their judgments of foreclosure. Plaintiffs' interests in Juneau Square were sold at a sheriff's sale on February 28, 1972, at which Marshall-Michigan purchased the property subject to the Aetna mortgage.

After the foreclosure Marshall-Michigan's attorney, John Sann, initiated negotiations on its behalf of Marshall-Michigan for the sale of Juneau Square to Baird & Warner. He offered to sell the property free and clear of all encumbrances, except the Aetna mortgage, to Baird & Warner for $1,175,000—an offer inconsistent with plaintiffs' theory that Marshall-Michigan was conspiring to turn the property over to First Wisconsin. Baird & Warner refused his offer. Sann then contacted Holscher of First Wisconsin, and they commenced negotiations. Those negotiations resulted in an agreement, and on March 25, 1972, Marshall-Michigan sold its interest in the Juneau Square block to Marshall-Wisconsin, a wholly owned subsidiary of First Wisconsin.

Most of the evidence offered by plaintiffs at both trials concerned First Wisconsin's alleged attempts to interfere with their efforts to secure mortgage financing for Juneau Square East. Of the 20 to 30 persons and firms contacted by plaintiffs

for financing after Aetna's rejection, plaintiffs were able to produce evidence of contact between First Wisconsin and any of the prospective lenders in only two instances—Metropolitan Life Insurance Company and New York Life Insurance Company. Specifically, both of these companies telephoned First Wisconsin to inquire about Juneau Square, a circumstance that is hardly remarkable or suspicious, (a) since banks are a normal source of credit information, (b) since First Wisconsin had provided the construction loan for Juneau Square South, and (c) since First Wisconsin was one of the creditors that would be paid if plaintiffs ever obtained new funding and made the property profitable.

Plaintiffs' allegations that First Wisconsin interfered with its Metropolitan and New York Life loan applications—the heart of plaintiffs' case—were rejected by the jury at the second trial. The facts pertaining to plaintiffs' unsuccessful attempt to obtain financing from Metropolitan are set forth in the district court opinion (Pet.App. 59-61, 82-83). The record indicates that Metropolitan declined to loan plaintiffs money for Juneau Square East because of tight market conditions and the availability of more attractive investment opportunities elsewhere.

Both the district court and court of appeals' decisions (Pet.App. 65-68, 83-86, and 9-10, respectively), likewise, discussed the facts concerning First Wisconsin's alleged role in New York Life's refusal to provide mortgage financing for East. The conclusion reached by both courts was that, as the trial judge wrote: "The overwhelming evidence indicated that the concern of the committee [New York Life's Real Estate and Mortgage Loan Committee, which declined plaintiffs' application] was the [financial unsuitability of the project's sponsor,] Midland bank." (Pet.App. 84; PX 388, p.1, Res.App.5.) The credit report purportedly given by First Wisconsin to New York Life, and its reference to the fact that plaintiffs may have mishandled funds was not, the record showed, "a factor in the loan rejection" (Pet.App. 84).

After two long trials, extensive post-trial motions, and thorough review by the court of appeals, plaintiffs now seek to take their case to yet a higher level. The facts do not warrant the further prolongation of this litigation.

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

The decision of the court of appeals is correct, and there are no special or important reasons to grant the writ. The appellate court decision does not conflict with any decision of this Court or any court of appeals, does not sanction any abuse of discretion or improper conduct by the trial court, and does not warrant further review. Plaintiffs have attempted to cast their complaints in the rhetoric of broad legal principles. The real disputes between plaintiffs and defendants, however, are the fact issues set forth in plaintiffs' and defendants' contrasting statements of the case, and the jury at the second trial definitively decided those issues in favor of defendants.

Plaintiffs, nonetheless, argue to this Court, as they did to the court of appeals, that the district judge abused his discretion in granting defendants a new trial after the first trial in 1976, and assert that the court of appeals erred in not ordering a third trial after the 1978 trial because of a variety of errors supposedly committed at that trial by the district judge. Neither of these charges is meritorious, and "review [of these contentions] would be of no importance save to the litigants themselves." *Rudolph* v. *United States,* 370 U.S. 269, 270 (1962). Certainly, the questions presented by plaintiffs are not of the character Rule 17 requires in order to justify scrutiny by this Court.

II.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE NEW TRIAL ORDER OF THE DISTRICT COURT.

A.

The District Judge's Finding That He Had Erroneously Admitted Prejudicial Hearsay Evidence Was Sufficient To Support His Granting Of A New Trial.

A reading of plaintiffs' Petition leaves the impression that the only significant ground for the district judge's grant of a new trial to defendants was his belief that the jury verdict in the first trial was against the weight of evidence. This impression is entirely inaccurate. As stated at pp. 2-3, *supra*, the district judge granted a new trial for a number of reasons, one of which was that he had erroneously admitted unfair, highly prejudicial and unreliable third and fourth hand hearsay evidence. This is the factor on which the court of appeals concentrated. As the court of appeals noted (Pet.App. 20), if a single ground supports the new trial order, it is not reversible. *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *Nuttall* v. *Reading Co.*, 235 F.2d 546, 548 (3d Cir. 1956).

The hearsay evidence in question, to which plaintiffs refer only in passing in their Petition (Pet. 21-22), is discussed in detail in both the district court and the court of appeals decisions (Pet.App. 85-88 and 15-20, respectively). Although the court of appeals held that the admission of this evidence was—even without taking into account the numerous other factors cited by the district judge—sufficient to justify the awarding of a new trial, plaintiffs almost entirely ignore the subject in their Petition.

Both the trial court and the court of appeals focused on two items of hearsay evidence which were erroneously admitted. These items related to the critical issue of the credit report New York Life obtained from First Wisconsin on Juneau Square.

First, plaintiffs' principal witness, Jack Moertl, was permitted to testify that Jack Cisco (one of plaintiffs' loan brokers) characterized the oral credit report given by Little of First Wisconsin to Davey of New York Life—which Davey, in turn, purported to summarize in a memorandum—as an "Al Capone" credit report which portrayed plaintiffs as "crooks." Moertl was allowed to testify that Cisco further told him that it was this report that caused New York Life to refuse to provide financing for the project. Cisco did not testify at the first trial, and there was no evidence as to the source of his information. It was clear, however, that he had never seen Davey's written report of the conversation with Little, much less heard Little make that report, and it was also apparent that Cisco was not present at the New York Life meeting where the financing was rejected.[3] Consequently, the testimony admitted was at least triple hearsay—Moertl testifying as to what Cisco had told him based on what some unidentified person had told Cisco about the impact of what was in Davey's memorandum of his conversation with Little.

This testimony, to which plaintiffs' counsel alluded throughout the first trial, was highly prejudicial to First Wisconsin for two reasons. First, it attributed New York Life's rejection of the Juneau Square application to a credit report on plaintiffs, whereas all the New York Life witnesses testified that it was Midland's inadequate resources that caused the rejection. Second, this hearsay conversation characterized as an "Al Capone" report what First Wisconsin contends was nothing more than a truthful response to Davey's inquiries phrased mildly in view of the actual facts.

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[3] Cisco did testify at the second trial and admitted that his statements to Moertl were based on statements made to him by persons not present at the New York Life meeting.

This unreliable testimony was offered under the representation that it was not being introduced for the truth of the matters asserted in the conversation. Yet as the district court pointed out (435 F.Supp. at 1323, Pet.App. 86), plaintiffs' counsel repeatedly emphasized the Cisco's purported "characterization" of the Davey report as if Cisco's inflammatory statements were entirely true. Plaintiffs' counsel, for example, concluded his discussion of the New York Life turndown in final argument at the first trial with the observation that: "That is what happened in 1971, and that is how we get that report that puts these people in such a terrible light and that is the Al Capone Report."

Second, plaintiffs were permitted to introduce other highly prejudicial hearsay evidence bearing on the central factual issue in the case, New York Life's rejection of plaintiffs' loan application. PX 408 is a perfect illustration of the validity and importance of the policies which have long led the courts to exclude hearsay evidence. In his memorandum (PX 408) New York Life Real Estate and Mortgage Loan Committee Chairman Lutz implicitly charges First Wisconsin with trying to stop New York Life from providing financing to plaintiffs based on alleged conversations between First Wisconsin officers and another of plaintiffs' brokers, Dick Krauss. The prejudicial nature of the memorandum is apparent, and the uncontroverted evidence is that the report on which it was premised was totally false—an error resulting from the multiple levels of hearsay involved.

The charges recounted in PX 408 caused Lutz to investigate the matter. His report of his investigation (PX 406, see also PX 407, Res.App. 6-8) exonerated First Wisconsin and cast further doubt upon the veracity of Krauss, who (Lutz wrote) "is considered capable of doing anything to make a deal." Lutz' statements in PX 408 are fourth level hearsay. First Wisconsin's alleged comments were filtered through Krauss, Faulkner, and Wilford before they got to Lutz. As

indicated in PX 406 (Res.App. 6), Krauss, when asked directly, said he had simply received general inquiries from First Wisconsin. This is also what Krauss, who was plaintiffs' witness, said under oath at the second trial. He added that in the course of his business he regularly made and received calls to and from other Milwaukee firms with real estate interests, including First Wisconsin, for the purpose of exchanging information and that the calls in question were in that category.

Moertl's conversation with Cisco in which Cisco purportedly said that the financing had been killed by an Al Capone credit report, and the Lutz memorandum just described, were—as both the district judge and the court of appeals recognized—central to plaintiffs' case at the first trial. Though clearly inadmissable, this dramatic evidence provided the foundation for plaintiffs' contention that First Wisconsin frustrated Juneau Square's efforts to obtain financing from New York Life and was frequently reiterated by plaintiffs during the first trial.

B.

The District Court Applied The Proper Standards In Setting Aside The First Verdict Based On The Overwhelming Weight Of The Evidence.

The district court's decision to set aside the first verdict and to order a new trial was, as noted above, based on a multiplicity of factors. Although the court of appeals concentrated on the prejudicial hearsay evidence discussed in the preceding section of this brief, it also stated that: "We have examined the remaining factors upon which Judge Warren relied and they indicated that he was remarkably thoughtful and candid in evaluating the prejudice that certain of his actions may have caused defendants." (Pet.App. 20.) One of these factors was that on issues crucial to plaintiffs' case, the evidence "overwhelmingly" favored defendants. (Pet.App. 84.)

The trial court's understanding of the legal standards applicable to a new trial order is set forth at 435 F.Supp. 1321 (Pet.App. 81-82), and is consistent with the decisions of this Court. *Montgomery Ward & Co.* v. *Duncan,* 311 U.S. 243, 251 (1940); *Byrd* v. *Blue Ridge,* 356 U.S. 525, 540 (1958).

Because a motion for a new trial, unlike a motion for directed verdict or for judgment notwithstanding the verdict, does not seek a final judgment, but another trial, the judge may on a motion for a new trial set aside the verdict even though there is substantial evidence to support it. *Altrichter* v. *Shell Oil Co.,* 263 F.2d 377, 380 (8th Cir. 1959); *Moist Cold Refrigerator Co.* v. *Lou Johnson Co.,* 249 F.2d 246, 256 (9th Cir. 1957).

This is the "weight of the evidence" standard applied by the trial judge. The standard expressly contemplates the exercise of judicial discretion, and—plaintiffs' unsupported assertions to the contrary notwithstanding (Pet. 17)—there is nothing uncertain about this standard, nor is there any conflict among the circuits with respect to it.

There is likewise nothing to suggest that the trial judge substituted his view of the evidence for that of the jury (*contra,* Pet. 20-21). Plaintiffs' attempt to show that the trial court used an inappropriate standard for review by quoting from the court's later opinion rejecting their application for an interlocutory appeal under 28 U.S.C. 1291(b). These arguments rely on a purposeful misconstruction of the court's references to adopting "a view of the case" and "a view of the evidence." They imply that such phrases are somehow an admission of error.

Plaintiffs go on to point out that the district court believed that its "view of the evidence" was "supported by substantial evidence." Presumably plaintiffs mean to imply that the district court was stating that it had granted the new trial because there was substantial evidence contrary to plaintiffs' theories. That is clearly not a fair or accurate reading of the court's statement.

The "view of the case" and "view of the evidence" to which the court referred are the views it took in its prior opinion; that is, that there was sufficient evidence in the record to *deny* defendants' motion for judgment notwithstanding the verdict, but that prejudicial errors in admitting evidence, the overwhelming weight of the evidence, and an unfair trial schedule required a new trial. It was this "view" which the court adopted and for which the court said there was "substantial evidence."

C.

The Court Of Appeals Properly Reviewed The Order Granting A New Trial.

Plaintiffs cite one case in which a court of appeals suggested that its scope of review is "somewhat broader" for orders granting new trials than it is for those denying new trial motions. *Massey* v. *Gulf Oil Corporation,* 508 F.2d 92 (5th Cir. 1975). There is nothing in the court of appeals opinion (Pet.App. 13-14) to suggest that it did not review the district judge's order in a manner appropriate to reviewing orders granting new trials. Certainly, no conflict exists between the court of appeals opinion in *Massey* and the appellate decision here, especially in light of the fact that the *Massey* court began its discussion of this issue by stating—in language almost identical to that of the court of appeals here—that: "In this circuit the ruling of a trial judge in either granting or denying a motion for a new trial is reviewable under an abuse of discretion standard." (508 F.2d at 94.) The *Massey* court, moreover, affirmed the district court's order granting a new trial and did so on the basis that the jury's verdict was against the weight of the evidence. (508 F.2d at 98.)

Plaintiffs cite no authority for their thesis that the court of appeals applied an inappropriate standard in reviewing the district judge's new trial order, and the case law is clear that the grant or denial of a new trial by a federal district court should not be reversed except upon a showing of a "clear abuse of

discretion." *Hahn* v. *Becker,* 588 F.2d 768, 771 (7th Cir. 1979); *Durant* v. *Surety Home Corp.,* 582 F.2d 1081, 1088 (7th Cir. 1978); *Hanson* v. *Shell Oil Co.,* 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied,* 429 U.S. 1074 (1977); *Stinebower* v. *Scala,* 331 F.2d 366, 367 (7th Cir. 1964).

III.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DENIAL OF PLAINTIFFS' MOTION FOR A THIRD TRIAL.

A.

The District Court's Restraint Of Trade Instruction Was Not Erroneous.

Plaintiffs contend that the court of appeals erred in not granting them a third trial based upon the district court's instruction at the second trial concerning restraint of trade (Pet. 23-24). As the court of appeals held, however, the challenged instruction on restraint of trade is a correct statement of the law. The court's instruction, only a portion of which plaintiffs criticize, was that (Pet.App. 22-23):

> The term "restraint of trade," which must be the objective or effect of any contract, combination or conspiracy condemned by the anti-trust laws contemplates only an unreasonable restraint of trade. The law recognizes that it may be impossible to conduct a business without in some degree restraining trade. The antitrust laws were enacted for the protection of competition, not competitors. The plaintiffs must, therefore, establish that the defendants' acts injured not only the plaintiffs themselves, but competition in the leasing of office rental space in the central business district of the City of Milwaukee.

> The plaintiff is not entitled to recover in this case by showing that concerted activities of the defendants restrained interstate commerce in some degree. They must also show that there was an unreasonable restraint. A restraint is unreasonable if it tends or is reasonably calculated to prejudice the public interest. It is for you to decide whether the evidence in this case shows an unreasonable restraint, and the plaintiff may not recover unless you find an unreasonable restraint by preponderance of the evidence as defined in these instructions.

Plaintiffs challenge only the last two sentences of the first paragraph quoted above. The first of these sentences is a direct quotation from *Brunswick* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). See also, *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962). Plaintiffs argue that the instruction was erroneous because they were not required to show actual injury to competition. As the court of appeals correctly stated, however, the Sherman Act requires more than mere injury to a competitor. Plaintiffs must also show that the "effect upon competition in the market place is substantially adverse." *United States* v. *Arnold Schwinn & Co.*, 388 U.S. 365, 375 (1967); and see, *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Magnus Petroleum Co.* v. *Skelly Oil Co.*, 599 F.2d 196, 204 (7th Cir.), *cert. denied*, 100 S.Ct. 231 (1979); *Lee Klinger Volkswagen, Inc.* v. *Chrysler Corp.*, 583 F.2d 910, 914-915 n.6 (7th Cir.), *cert. denied*, 439 U.S. 1004 (1978).

In evaluating plaintiffs' specific complaints about instructions, moreover, one must look beyond individual phrases and sentences and consider the instructions as a whole. See, for example, *Odekirk* v. *Sears, Roebuck & Co.*, 274 F.2d 441, 446 (7th Cir. 1960); Wright & Miller, 11 *Fed. Prac. & Pro.*, § 2886 at p. 293 (1973). In this instance, as the court of appeals noted (Pet.App. 22-23), the criticized language was only part of an entire section of instructions on restraint of trade. Also included in those instructions was the explanation that the purpose of the

Sherman Act "is to preserve and advance our system of free competitive enterprise and to encourage to the fullest extent practicable free and open competition in the market place," as well as the directive (quoted above) that "a restraint is unreasonable if it tends or is reasonably calculated to prejudice the public interest."

The cases cited by plaintiffs (Pet. 23-24) are not to the contrary. The instruction given by the trial judge and which the court of appeals found to be a correct statement of the law, did not tell the jury that it needed to find evidence of public injury before it could render its verdict for the plaintiff. The instruction merely required that plaintiffs prove that the type of injury for which they sought relief under the antitrust laws was injury having an effect upon competition.

B.

The Court Of Appeals Correctly Upheld The Trial Court's Refusal To Give Plaintiffs' Instruction That Defendants' Unfair Competition Was A Per Se Violation Of The Sherman Act.

Plaintiffs assert that a conflict among the circuits has been created by the court of appeals' affirmance of the trial court's refusal to instruct the jury that "unfair methods of competition, when used as part of a conspiracy the object of which is to destroy the business of a competitor, are in and of themselves unreasonable restraints of trade." This assertion is erroneous. Moreover, whatever the status of the law on this issue might be, the instruction sought by plaintiffs would have been improper because there was no evidence that First Wisconsin intended to eliminate plaintiffs as competitors. There was evidence that First Wisconsin wanted to acquire the Juneau Square block (which was situated immediately east of its own headquarters building), but no evidence was introduced that First Wisconsin intended to eliminate plaintiffs or cared whether or not they built or operated office buildings in any other location.

Petitioners' proposed instruction is drawn from the First Circuit's largely repudiated decision in *Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir. 1932), and in fact goes beyond that decision in seeking, for the first time, to apply it to potential competition.

The *Pick-Barth* rule was at one time supported by decisions in the First and Tenth Circuits. *Atlantic Heel Co.* v. *Allied Heel Co.*, 284 F.2d 879 (1st Cir. 1960); *Perryton Wholesale, Inc.* v. *Pioneer Distributing Co.*, 353 F.2d 618 (10th Cir. 1965). Both of these circuits, however, have retreated from the rule and have left open the question whether they will apply it in any situation. *Engine Specialties, Inc.* v. *Bombardier Ltd.*, 605 F.2d 1 (1st Cir. 1979), *cert. denied*, 48 U.S.L.W. 3785 (June 3, 1980); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Craig* v. *Sun Oil Co. of Pennsylvania*, 515 F.2d 221 (10th Cir. 1975), *cert. denied*, 429 U.S. 829 (1976).

The basis of repudiation of the *Pick-Barth* rule has been that, by eliminating the need for a showing of effect on competition, it tends to divert the antitrust laws from their proper purpose of preserving competition to the purpose of providing a treble damage remedy for ordinary business torts. See *Northwest Power Products, Inc.* v. *Omark Industries, Inc.*, 576 F.2d 83, 86-90 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979). The repudiation of *Pick-Barth* has gained impetus by this Court's reluctance to extend per se rules and its stress on the fact that the purpose of the antitrust laws is to protect competition not competitors. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977). For these reasons, plaintiffs' claimed conflict among the circuits in respect of the *Pick-Barth* rule is illusory.

In any event, plaintiffs were not entitled to such an instruction, inasmuch as there was no evidence in the record to support it. As plaintiffs themselves recognized in their proposed

instruction, the *Pick-Barth* rule requires an intent not merely to injure but completely to eliminate a competitor. Furthermore, the rule requires a showing of "subjective intent" or "motive". *George R. Whitten, supra,* 508 F.2d at 559-560. As is shown above (pp. 7-8), there is no evidence that First Wisconsin had any concern with or intent to eliminate plaintiffs as competitors, potential or otherwise. Consequently, even if the expanded *Pick-Barth* instruction which plaintiffs sought were an accurate statement of law, the trial court could not properly have given the instruction for want of any evidentiary basis to support it. Accordingly, the result in this case does not place the Seventh Circuit in conflict with any other circuit.

C.

The Court of Appeals Sanctioned No "Radical Departure From The Accepted And Usual Course of Judicial Procedures" In Denying Plaintiffs' Appeal.

Apparently in order to fit their numerous complaints about the two trials into a category appropriate for review under this Court's Rule 17, plaintiffs have gathered together (Pet. 27-29) a miscellaneous collection of supposed grievances, which (they claim) required the court of appeals to reverse the trial judge. These claims are specious.

Plaintiffs first charge (Pet. 27) that the district judge set aside the first verdict on "speculative grounds." The admission of prejudicial hearsay evidence was, as noted above (pp. 12-15) the principal ground on which the court of appeals affirmed the district court's new trial order, and plaintiffs do not contend that there was anything speculative about the district court's evaluation of that evidence. Similarly, plaintiffs—while unhappy with the trial judge's ruling on the weight of the evidence—do not claim that that conclusion was based on speculation. Where plaintiffs do make this assertion, for example with respect to the imbalance of time allowed each of the parties, they are plainly wrong. The district court's opinion explains the problem (Pet.App. 88-89):

> The plaintiffs were permitted to proceed at their own pace; the presentation of plaintiffs' case lasted for thirteen weeks. During this period, the jury was inundated with numerous exhibits and extensive testimony of a background nature. The plaintiffs did not reach the relevant period—the period of the actual conspiracy—until the second or third week of trial. Plaintiffs had originally led the Court to believe that the entire trial would last four to six weeks.
>
> By the time the plaintiffs rested, the Court's trial calendar was in a shambles. All the trials previously scheduled for summer and early fall had to be cancelled. Of particular concern was the backlog of criminal trials. In order to comply with the dictates of the Speedy Trial Act, the Court was forced to establish time limitations. As a result, the defendants were pressured to complete their respective cases in little more than three weeks. The impact of this unfortunate set of circumstances on the jury and the defendants cannot be lightly dismissed.

The district judge, who had presided over the five month first trial, was, likewise, uniquely able to assess the likely impact on the jury of the length and complexity of the evidence presented to them (Pet.App. 89-90), as well as to judge the inherent potential for duplication of damages that resulted from plaintiffs' insistence on proving their damages on a "project" basis (Pet.App. 90-92).

Plaintiffs also complain about numerous trial management and evidentiary rulings made by the district judge at the second trial. These rulings were upheld by the court of appeals, and were discussed extensively in the trial court's opinion denying plaintiffs' motion for a third trial (Pet.App. 152-167). Each of the evidentiary and trial management decisions challenged here by plaintiffs is of the sort typically entrusted to the sound discretion of the trial judge, who is in the best position to apply the rules of evidence and to determine the manner in which the trial will proceed. None of these matters meets the standards set forth in Rule 17.

Finally, plaintiffs assert (Pet. 28) that the court of appeals sanctioned a "radical departure from the accepted and usual course of judicial procedures" by declining to instruct the jury at the second trial with respect to a dozen or more issues of state or common law. Since plaintiffs chose to bring a federal antitrust case, and not a common law tort case or an action under state law, this ruling was entirely appropriate. See the district court's discussion of this subject (Pet.App. 144-146).

IV.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE DIRECTED VERDICT ENTERED BY THE DISTRICT JUDGE ON PLAINTIFFS' MONOPOLIZATION CLAIMS.

Upon completion of plaintiffs' case-in-chief at the first trial, the district court granted defendants' motions for directed verdicts on plaintiffs' claims under Section 2 of the Sherman Act. (Plaintiffs did not include this decision of the district court in their appendix, but a copy of the decision is filed herewith, Res.App. 9-17.) The court of appeals affirmed this ruling (Pet.App. 28-30.)

Plaintiffs do not deny that the offense of monopolization under Section 2 of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth. . . ." *United States* v. *Grinnell Corporation,* 384 U.S. 563, 570 (1966). Similarly, plaintiffs do not deny that a charge of attempted monopolization requires proof of specific intent to monopolize and conduct manifesting that intent, combined with a dangerous probability of success. *Photovest Corp.* v. *Fotomat Corp.,* 606 F.2d 704, 711 (7th Cir. 1979), *cert. denied,* 100 S.Ct. 1278 (1980).

Directed verdicts were thus entered against plaintiffs on these issues not because of any difference of opinion as to the operative law, but because plaintiffs failed to present any proof tending to establish the defendants possessed substantial power in the market as they defined it. (Both the trial court and the court of appeals accepted plaintiffs' unsubstantiated and overly narrow geographic and product market definitions for the purpose of ruling on the motions for directed verdict.)

Plaintiffs quarrel with the court of appeals' statement that they presented no evidence of defendants' specific market share at trial, citing as authority only excerpts of the brief they had earlier filed with that court. The market share percentages recited in their brief to the court of appeals were never mentioned in their brief to the trial court on the motion for directed verdict, nor are these percentages percentages of either the market alleged in the complaint, or the relevant market plaintiffs asserted at trial through their expert witness. With neither citation nor explanation, plantiffs then announce (Pet. 29) that they had "introduced more direct evidence of monopoly power: proof that defendants were in fact fixing prices and excluding competition in the market." No such evidence was ever introduced.

It is true, of course, that plaintiffs' expert testified to some of the various factors that might have been relevant to an evaluation of market power. He did not purport to testify, and was not qualified to testify, however, as to First Wisconsin's market share. This supposed expert acknowledged that he did not know what market power was possessed by other lessors of rental office space in downtown Milwaukee and admitted that he had not made an economic evaluation of the relevant market. As the district court noted (Pet.App. 45-46):

> It is quite apparent that plaintiffs' expert relied upon "bigness" in the abstract sense. Failure to consider the power of the other sellers in the market is fatal to plaintiffs' claims of monopolization. There is no evidence indicating that there is an absence of competitors or of substantial competitive office space in the relevant market.

* * *

> In the final analysis, plaintiffs have not met their burden of proof as to the requirement of a showing of monopoly power. This Court would be remiss if it permitted the jury to speculate as to the power of the First Wisconsin defendants in an isolated matter without a consideration of the power of the other sellers in the market place.

Finally, plaintiffs assert—again with neither citation nor explanation—that "the district court found, in effect, that there was evidence from which the jury could find that defendants were in fact in the very process of achieving the forbidden result, thus clearly demonstrating at least a dangerous probability of success" (Pet. 30). The finding of the district court was, in fact, exactly the opposite. Defendants, it said, "are effectively precluded from further expansion in the relevant market" by the federal banking laws and regulations promulgated thereunder. (Pet.App. 49-50.) Cf., *United States* v. *Citizens and Southern National Bank*, 422 U.S. 86, 91 (1975); *United States* v. *Marine Bancorporation*, 418 U.S. 602, 605-606 (1974).

CONCLUSION

For the reasons set forth above, respondents respectfully urge that this Court deny the petition.

Respectfully submitted,

W. DONALD MCSWEENEY
JOHN J. VOORTMAN
PETER V. BAUGHER
REUBEN A. BERNICK

Attorneys for Marshall Michigan and the First Wisconsin Respondents

Dated: October 31, 1980

Appendix

APPENDIX

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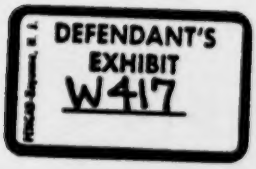
September 30, 1976 District Court memorandum and order denying defendants' motions for directed verdict, except as to plaintiffs' Section 2 claims (excerpting that portion concerning the court's ruling on monopolization)	App. 9

WIL-TEN CO. INC. AND SUBSIDIARIES
(INCLUDING JUNEAU SQUARE CORP.)
DETAIL SUMMARY OF INCOME STATEMENT INFORMATION
U. S. CONSOLIDATED INCOME TAX RETURN

Year	Total Income	Total Deductions	Taxable Income (Loss)	Cumulative Loss From Operations
1960	$ 5,415	$ 10,683	$ (5,268)	$ (5,268)
1961	33,510	40,068	(6,558)	(11,826)
1962	130,417	125,206	5,211	(6,615)
1963	248,101	268,391	(20,290)	(26,905)
1964	445,443	579,992	(134,549)	(161,454)
1965	768,493	781,375	(12,882)	(174,336)
1966	1,032,903	1,103,335	(70,432)	(244,768)
1967	960,042	1,282,140	(322,098)	(566,866)
1968	1,082,110	1,329,806	(247,696)	(814,562)
1969	1,222,263	1,523,835	(301,572)	(1,116,134)
1970	1,172,900	1,244,965	(72,065)	(1,188,199)
1971	1,014,911	1,358,201	(343,290)	(1,531,489)
1972	355,202	530,994	(175,792)	(1,707,281)



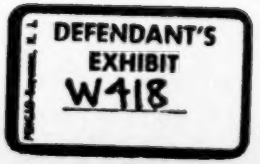
WIL-TEN CO., INC. AND SUBSIDIARIES
(INCLUDING JUNEAU SQUARE CORP.)

SUMMARY OF NET WORTH (1)

Year	Capital Stock	Earned Surplus (Deficit)	Minority Interest	Net Worth(3)	Revaluation Surplus
1960	$40,000	$ (5,268)	$ -	$ 34,732	$ -
1961	40,000	(21,705)	-	18,295	-
1962	40,000	(10,332)	-	29,668	-
1963	40,000	(32,746)	-	7,254	-
1964	45,000	(175,727)	-	(130,727)	-
1965	45,000	(453,640)	698,202	289,562	638,000
1966	45,000	(224,380)	1,513,378 (2)	1,333,998	247,694
1967	45,000	(744,827)	537,652	(162,175)	304,600
1968	45,000	(945,470)	496,085	(404,385)	284,600
1969	45,000	(1,240,836)	1,102,394 (2)	(93,442)	384,600
1970	45,000	(1,456,556)	864,254 (2)	(547,302)	284,600
1971	45,000	(1,781,927)	756,954 (2)	(979,973)	284,600
1972	45,000	(1,957,717)	729,626 (2)	(1,183,091)	284,600

App. 2

(1) Source: U.S. Consolidated Income Tax Return for the year indicated.
(2) Includes investment of Marshall-Michigan Company, Inc.
(3) Excludes revaluation surplus.



JUNEAU SQUARE CORP. AND RELATED COMPANIES

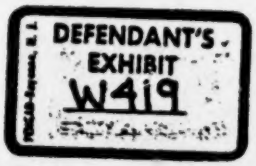
NET INVESTMENT

BY MESSRS. MOERTL, SPODEN AND CONWAY

(Rounded to Nearest Thousands of Dollars)

	Moertl	Spoden	Conway
Juneau Square Operations:			
Investments remaining in the business for a period of one year or more	$47,000	$69,000	$117,000
Disbursements to or on behalf of principals, excluding reimbursement of indicated business expenses and indicated payments to principals as an agent for third parties (1)	49,000	89,000	2,000
Excess investment or (disbursement)	(2,000)	(20,000)	115,000
Wil-Ten Co. Operations:			
Investments remaining in the business for a period of one year or more (2)(3)	71,000	6,000	71,000
Disbursements to or on behalf of principals, excluding reimbursement of indicated business expenses and indicated payments to principals as an agent for third parties (4)	71,000	218,000	69,000
Excess investment or (disbursement)	-0-	(212,000)	2,000
Net excess investment or (disbursement)	$(2,000)	$(232,000)	$117,000

(See explanatory footnotes on next page)



[WX 419, P

(1) Excludes approximately $10,000 of disbursements to principals because of insufficient references in the companies' books and records.

(2) Includes $30,200 of receipts representing items for which references in the companies' books and records are insufficient to classify the amounts.

(3) Excludes approximately $105,000 of amounts noted as notes payable to Messrs. Spoden and Schroeder and approximately $125,000 representing R. W. Conway's interest in the Hartsdale, Kansas City and Capitol Drive projects. A review of the companies' cash receipts records did not disclose any items pertaining to these amounts.

(4) Excludes approximately $55,200 of disbursements to principals because of insufficient references in the companies' books and records.

May 19, 1971

MEMORANDUM FOR MINUTES:

Re: Total Offering $12,000,000.
SWC Wisconsin Ave. & Marshall St.
Milwaukee, Wisconsin

The Real Estate and Mortgage Loan Committee considered this offering and concluded that The Midland National Bank did not qualify according to our requirements as a joint venturer or for master lease purposes.

Donald Allen
Sec'y R.E. & Mtge. Loan Committee

W - No
[illegible] - No
[illegible] - Yes
[illegible] - No
[illegible] - "
[illegible] - "

PLAINTIFFS' EXHIBIT 588

PX 406

Referred to MORTGAGE L[illegible] MANAGER FAULKNER

Phil:-

After you have had an opportunity to digest the attached material, I'd like you to go over in your own mind as to how he handled this conversation and fill me in by phone. I am very concerned with my findings.

WILLIAM C. LUTZ
Vice President in charge of
Real Estate and Mortgage Loans

6/22/71

Krause original conversation work up.

our file copy

NEW YORK LIFE

OFFICE MEMORANDUM

DATE June 22, 1971

TO FILE

SUBJECT Dick Krause
Baird & Warner
Milwaukee Office

FROM William C. Lutz

The proposed joint venture and mortgage loan involving Juneau Square Corporation and Midland National Bank in Milwaukee resulted in some alleged statements being made by Dick Krause to our Manager Faulkner who quite properly conveyed them to Regional Officer Wilford who referred them to the Home Office. The matter was serious enough to warrant checking the information out with Mr. Krause. This resulted in a conference call involving Fred Duncan and myself, during which call Mr. Krause said there was a misunderstanding - that the two officers of First Wisconsin Bank were simply interested in knowing whether the applicants were actually seeking a loan, etc., etc.

Since this conversation created a creditability gap, I talked to Mills Perry of Mortgage Associates, who formerly employed Dick Krause. The results of that conversation leave little doubt but that Mr. Krause is considered capable of doing anything to make a deal. It is my opinion that we keep this knowledge to ourselves and bear it in mind when dealing with this man in future transactions.

WCL

Vice President

WCL:PH

Confidential copies to Assistant Vice President Wilford
Mortgage Loan Manager Faulkner
Treasurer Duncan

OFFICE MEMORANDUM

On tape
DATE May 28, 1971

FILE

William C. Lutz

SUBJECT: Proposed loan - joint venture to be formed with following participants: Juneau Square Corporation and Midland National Bank - SWC Wisconsin Avenue an Marshall Street, Milwaukee, Wisconsin

In a discussion with Regional Officer Wilford (later confirmed by Manager Faulkner) I learned that Dick Krause, who manages Baird & Warner's Milwaukee Office, had made certain remarks about telephone calls that were exchanged between him and two officers of the First Wisconsin Bank. He allegedly was told that the bank was interested in knowing whether the applicants, or anyone associated with them, had any "clout" with New York Life. In their conversation they allegedly claimed they didn't want this building built, apparently because it would interfere with the timing of the leasing in their proposed building. The intimation was that there were veiled suggestions that First Wisconsin would use their best efforts to delay or interfere with the construction of this building.

I acquainted Fred Duncan with this information and then called Manager Faulkner to ask whether he would be embarrassed if Fred Duncan and I talked in a conference call with Dick Krause of Baird & Warner. He said certainly not and again confirmed that he had been told two different officers of the bank had called Dick Krause.

Fred and I then phoned Dick Krause but received contradictory information from him. He admitted that two bank vice presidents had called him but stated they had simply wanted confirmation of the fact that an application along the terms they had been advised had been submitted to New York Life.

Then, in answer to a question from Fred Duncan, he confirmed that construction had already started on First Wisconsin's building; that construction being excavation which is now under way. He also confirmed that super-adequate foundation is necessary to sustain the 42-story building that will be built on that site.

In further questioning Dick Krause claimed that the bank came into this deal on invitation from Baird & Warner and the bank insisted that if in the joint venture, they wanted to control the developer, and it was in this way that they came to be given controlling interest in Juneau Square Corporation's

operations. He also claimed that the bank had many people behind them who were ready and willing to put up the capital necessary between the floor loan and the ceiling loan.

This information has been conveyed to Manager Faulkner who expressed surprise at Mr. Krause's comments to us. He claims the Oliver Tyrone people are very interested in the project but want to redesign the building. I've cautioned him that this would delay construction and our principals would lose the advantage they now have of being able to come on the market about one year ahead of competing building.

Phil and Dick will review the prospects of other moneyed principals backing the Midland Bank principal to cover funds between the floor and maximum loans.

Vice President

WCL:S

A.S 4

PX 407 - p. 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JUNEAU SQUARE CORP., et al.

Plaintiffs,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, et al.

Defendants.

Case No. 72-C-533

MEMORANDUM AND ORDER

At the conclusion of plaintiffs' case in chief, defendants moved for directed verdicts pursuant to rule 50 of the Federal Rules of Civil Procedure. Defendants have set forth various grounds in support of the aforestated motions in urging the Court to find that there is insufficient evidence in the record upon which the jury could properly find a verdict for plaintiffs. In reviewing the record, the Court is precluded from weighing the evidence or passing upon the credibility of witnesses or substituting its judgment for that of the jury. *See,* Wright & Miller, Federal Practice and Procedure: Civil § 2524 at 543. The Court must in effect view the evidence in a manner favorable to the plaintiffs and draw all reasonable inferences in support of plaintiffs' case. *Continental Co.* v. *Union Carbine,* 370 U.S. 690 (1962); *Valdes* v. *Karoll's, Inc.,* 277 F.2d 637 (7th Cir. 1960).

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III.

Defendants' claim that there is insufficient evidence in the record from which the jury could properly find the existence of monopolization or an attempt to monopolize on the part of the First Wisconsin defendants or a conspiracy to monopolize on the part of the other defendants. Plaintiffs concede that there is insufficient evidence to support a claim of monopolization or an attempt to monopolize on the part of Aetna or Marshall-Michigan.

Although the First Wisconsin defendants challenge plaintiffs' definition of relevant market and defined product,[3] they principally rely upon the lack of proof of monopoly power within the relevant market. It is clear that "the offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth . . ." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570 (1966). Monopoly power is defined as the power to control prices or exclude competition. *United States* v. *DuPont & Co.*, 351 U.S. 377 (1955).

Monopoly power is assessed by the percentage share of the relevant market as the existence of a substantial market share is highly probative of the alleged monopolist's ability to control prices or to exclude competition. Although the Supreme Court has never adopted a set standard, Judge Hand in *United States* v. *Aluminum Co. of America,* 148 F.2d 416, 424 (2d Cir. 1945), established guidelines which have been generally accepted as an accurate measure of monopoly power:

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[3] The Court is persuaded that there is sufficient evidence in the record to support an inference that the relevant market is the Central Business District and that the product is readily available office space which is defined as vacant space and that occupied space which would be readily available within a reasonable time period. The exact time limitations of the latter category were not accurately defined by plaintiffs' expert, but the estimate was anywhere between 2-9 months.

> [Ninety percent] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not.

The Seventh Circuit has adhered to these guidelines. *Kearney & Trecker Corporation* v. *Giddings & Lewis, Inc.*, 452 F.2d 579 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972); *Bendix Corporation* v. *Balax, Inc.*, 471 F.2d 149 (7th Cir. 1972).

Plaintiffs rely upon *United States* v. *Columbia Steel Co.*, 334 U.S. 495 (1948) and *Kearney & Trecker Corp.* v. *Giddings & Lewis, Inc., supra*, for the proposition that the existence of monopoly power does not require proof of a particular percentage share of the relevant market. If by this, plaintiffs suggest that the Supreme Court has not articulated a particular percentage figure in the sense that one selects 60 or 65 or 70 percent as a cutoff, this Court has no quarrel with the proposition. It is quite another thing to suggest that the Supreme Court has obviated the need for a showing that defendants control a substantial share of the relevant market. Neither the authority cited above nor any other authority brought to the Court's attention has suggested such a proposition.

Judge Hand indicated that sixty (60) percent would probably not be a sufficient showing. A review of recent caselaw indicates that in most cases the percentage figure is much higher. The Court need not concern itself with whether plaintiffs have established a sufficient market share because the record is practically devoid of such evidence. This total absence of proof is revealing in light of the fact that figures are presumably available and that plaintiffs represented in their briefs and supporting affidavits in opposition to the motions for summary judgment that such figures were available.

Plaintiffs concede that they have not established the market share controlled by the First Wisconsin defendants. In lieu thereof, they argue that market share is merely a means to help

determine whether or not a defendant has power to control prices or exclude competition and that monopoly power may be proven more directly by other means:

> Monopoly power can, of course, be proved by evidence of the exercise of actual control over prices or the actual exclusion of competitors. When such evidence is lacking, the existing monopoly power over the relevant market may be proved in other ways. In such cases a *full* and *complete economic evaluation* of the structure of the market and its functioning is necessary to determine whether, considering all factors, including *the relative size and strength of competitors, freedom of entry, pricing trends* and *practices, profits,* and *consumer demands,* the firm's power over supply, prices or entry is of such a nature as to constitute a monopoly. (emphasis added). *Antitrust Law Developments,* A.B.A. at 53 (1975)

The difficulty with plaintiffs' position is that they failed to make a full and complete economic evaluation of the structure of the market.

Plaintiffs' expert testified as to various economic factors including, *inter alia,* the existence of inherent barriers to entry in the market, the existence of economic power on the part of the First Wisconsin defendants because of its large assets and position as the largest bank in the State of Wisconsin, the fact that some of the directors of the First Wisconsin defendants are also directors of other large corporations, and the fact that First Wisconsin is able to subsidize its Juneau Square properties at a loss.

Notwithstanding the foregoing, plaintiffs' expert testified that he was uncertain as to the power in the market in the hands of *other sellers* of the product, and, in effect, conceded that he had not made a *complete* economic evaluation of the relevant market. It is quite apparent that plaintiffs' expert relied upon "bigness" in the abstract sense. Failure to consider the power of the other sellers in the market is fatal to plaintiffs' claims of

monopolization. There is no evidence indicating that there is an absence of competitors or of substantial competitive office space in the relevant market.

The little evidence in the record indicates that the market is saturated with sellers and readily available office space. Plaintiffs' exhibit 591 is a copy of a market study prepared by the Urban Investment and Development Co. for the Milwaukee Development Group, Inc. The study clearly indicates that although First Wisconsin is the largest seller in the market, it is but one of many. These figures are admittedly imprecise, but the study indicates that there is substantial competition from the MGIC building, the First Federal Plaza, the Marine Plaza, the Century Building, the Plankinton building, and many others. The four buildings listed above alone possess as much vacant space as the First Wisconsin Center.

Moreover, the study reveals that there is a varied price structure and that competitors do charge less and are in direct competition with the First Wisconsin defendants. Plaintiffs have submitted evidence from which the jury could infer that the First Wisconsin defendants charge more than any other competitor but that is their prerogative. There is no proof in the record that such prices in any way affect the prices charged by competitors and absent a showing that defendants control a substantial share of the market, there is no evidence in the record to support the inference that lessees are forced to accept the so-called monopolistic prices of the First Wisconsin defendants.

Plaintiffs' expert placed much reliance on the fact that the First Wisconsin defendants set their prices upon the ground that the only real competition in "first class" office space was the MGIC building and the First Federal Plaza. The difficulty with this approach is that plaintiffs have not defined the product as available first class office space in the Central Business District. It goes without saying that first class office space is limited to the newer and more prestigious buildings of Milwaukee. Of

these buildings, the First Wisconsin defendants definitely have an edge because of the imposing size of the First Wisconsin Center. The fact remains that the more prestigous buildings logically charge and conceivably are able to receive more for their office space. But here we are dealing with all of the available office space in the Central Business District which includes first class office buildings as well as the other office buildings in the relevant market.

In the final analysis, plaintiffs have not met their burden of proof as to the requirement of a showing of monopoly power. This Court would be remiss if it permitted the jury to speculate as to the power of the First Wisconsin defendants in an isolated manner without a consideration of the power of the other sellers in the market place.

IV.

Defendants also challenge the claim of attempt to monopolize principally upon the ground that there is no evidence from which the jury could find that there is a "dangerous probability" of monopolization.

> The phrase "attempt to monopolize" means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it, which methods, means and practices are so employed by the members of and pursuant to a combination or conspiracy formed for the purpose of such accomplishment. *American Tobacco Co.* v. *United States,* 328 U.S. 781, 785 (1946).

At the outset, it should be noted that plaintiffs have not established the market share of the defendants as discussed in part III of this opinion. Of course, plaintiffs need not show that defendants control a substantial share of the market, but proof of *some* share of the market is highly probative of the issue of whether a "dangerous probability" of monopolization exists. The absence of this critical economic data forces the jury to speculate as to the existence of any market share.

Regardless of the failure of proof cited above, the Court must concern itself with the issue of whether defendants' conduct, if continued, is likely to lead to monopoly power in the relevant market. Defendants raise two issues in this regard. First, attention is called to the fact that the First Wisconsin defendants have already indicated in writing to the Deputy Controller of the Currency and the Regional Administrator of National Banks their intention to sell the former office building and have attempted to sell it for some time. This sale, if effectuated, would drastically reduce defendants' share of the relevant market. This intent, it is argued, is clearly inconsistent with the requirement of a showing of specific intent in claims of attempted monopolization. Plaintiffs assert that defendants have not seriously attempted to dispose of the building but that in and of itself does not eliminate the requirement that First Wisconsin must eventually sell the building thereby reducing its market share.

Even if First Wisconsin manages to hold onto its former office building, further expansion into the market is proscribed by federal banking regulations. As such, this situation is analogous to that found in *Bendix Corporation* v. *Balax, Inc.*, 471 F.2d 149 (7th Cir. 1972). There a finding of invalidity with regard to certain patents effectively precluded the consummation of a monopoly. Without the patents, the alleged monopolization could not succeed.

In the case at bar, defendants are effectively precluded from further expansion in the relevant market by the following:

> A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:
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> First. Such as shall be *necessary* for its *accommodation in the transaction of its business.*
>
> Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.
>
> Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

> Fourth. Such as it shall purchase as sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.
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> But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years. (emphasis added) 12 U.S.C. § 29.

Regulation 7.3005 promulgated thereunder provides as follows:

> Real estate necessary to the accommodation of the bank's business includes real estate other than that upon which bank buildings are located. Thus, real estate use for parking facilities and data processing centers is necessary in the transaction of business. Such real estate also includes that held for future banking use, where the bank in good faith expects to utilize such property as bank premises. This will permit a prudent program of property acquisition for future bank use. Such real estate is to be treated as bank premises owned and so reported. 12 C.F.R. 7.3005.

Defendants cannot avoid these statutory provisions and regulations. Moreover, the Bank has sufficient space for expansion purposes for the next several decades. There is no way that the First Wisconsin defendants can obtain the substantial market share proscribed by the antitrust laws of the United States. In fact, the defendants are obligated to sell the former bank building as discussed above. Under these circumstances, the jury could not properly find the existence of a dangerous probability of monopolization.

Without reviewing the evidence of conspiracy to monopolize against Aetna and Marshall-Michigan, it is clear that plaintiffs' claims must fail because of a failure to prove monopolization or attempt to monopolize as discussed above.

One cannot conspire to monopolize without the existence of monopoly power or even the existence of a dangerous probability of monopolization in the one party which is alleged to be the monopolist. Defendants' motions for directed verdicts as they relate to the claims of monopolization, attempt to monopolize, and conspiracy to monopolize must therefore be granted.

NOW THEREFORE IT IS ORDERED that the motion of the Aetna Casualty & Surety Company for a directed verdict be and is hereby GRANTED;

IT IS FURTHER ORDERED that the motions of the Aetna Life Insurance Company, Marshall-Michigan Company, Inc., and the First Wisconsin defendants for directed verdicts be and are hereby DENIED as they relate to the claims in restraint of trade and be and are hereby GRANTED as they relate to the claims of monopolization.

So ordered this 30th day of September, 1976, at Milwaukee, Wisconsin.

ROBERT W. WARREN
United States District Judge